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No. 99-669

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

AMERICAN TELEPHONE & TELEGRAPH CO.,
Petitioner,

v.

SECURITY WATCH, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondent Security Watch, Inc. ("Security") all but concedes the certworthiness of the Question Presented. Security acknowledges, as demonstrated in the Petition (Pet. 8-17), that there is "substantial disagreement among the Courts of Appeals about whether the FAA rule against interlocutory appeals from decision[s] compelling arbitration applies to 'embedded' cases in which the District Court labels its decision as a dismissal rather than a stay of proceeding[s] and orders that the parties take their case to arbitration." Opp. 11. Similarly, Security offers not a word in defense of the Sixth Circuit's bizarre ruling that *state* law rules of contract interpretation trump the *federal* rule that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

Forced to concede so much, Security has no alternative but to manufacture factual disputes and procedural obstacles to defeat review of the Sixth Circuit's erroneous resolution of the important questions raised in the Petition. None of those tactics can change the fact that this case presents an excellent vehicle for providing much-needed guidance on these questions. Almost all of the Circuits have now weighed in on the immediate appealability of dismissals favoring arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 16. This pure question of statutory interpretation virtually cries out for review in this case, as does the Sixth Circuit's evisceration of the federal rule that all doubts must be resolved in favor of arbitration. Contrary to Security's misguided arguments, each aspect of the Question Presented can and should be resolved in this case, both to resolve the decisional conflicts that concededly exist as to both facets of the Question Presented and to effectuate Congress's de-

clared policy of favoring arbitration over litigation. The petition for certiorari, therefore, should be granted.

1. Unable to deny the existence of a square Circuit split on the immediate appealability of dismissals favoring arbitration under the FAA, Security tries to blur the issue altogether. Security would have this Court believe that AT&T "sought dismissal of Security's action on the basis that Security's purported contractual obligation to seek its remedies, if any, must be pursued in a different jurisdiction." Opp. 2. This is demonstrably false.

AT&T insisted throughout this case that, in addition to the other legal flaws in Security's claims, those claims should have been submitted to arbitration. In its joint motion to dismiss, AT&T "urge[d] this Court to dismiss the Complaint to allow the parties to pursue the ADR procedures set forth in the 1994 Agreement to completion," the final stage of which is binding arbitration. R. 94. Consistent with this invocation of the parties' agreement to arbitrate, the very first ground for dismissal argued in the motion to dismiss was the arbitrability of the dispute. This is evident from the Argument heading in the motion to dismiss ("I. THE COURT MUST APPLY THE FEDERAL ARBITRATION ACT TO THE AGREEMENT OF THE PARTIES TO ARBITRATE ALL OF THE CLAIMS SET FORTH IN THE COMPLAINT," *id.* at 96), as well as the ensuing six pages of Argument.[1]

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[1] *See, e.g.*, R. 98 ("Section 2 of the [Federal Arbitration] Act provides that a 'written . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy' that arises out of a contract is 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' These requirements are plainly satisfied here.") (omission in original); *id.* ("That there is an agreement in writing requiring these parties to settle their disputes by arbitration is not open to question."); *id.* at 99 ("[T]he claims underlying each cause of action in the Complaint are within the definition

Not surprisingly, in light of what AT&T actually argued in its motion to dismiss, the district court itself understood that AT&T sought dismissal on arbitration grounds. At the beginning of its opinion, the court stated: "The defendants filed a joint motion to dismiss under Federal Rule of Civil Procedure 12(b) asserting . . . (2) that the 1994 dealership contract, which supersedes all prior contracts between the parties, requires these disputes to be submitted to arbitration." Pet. App. 15a-16a. Therefore, Security's assertion that AT&T sought dismissal on choice-of-forum grounds only is flatly incorrect.

2. Unfortunately, Security does not content itself with misstating AT&T's position; Security also mischaracterizes the decisions below. Security first argues that the district court "simply did not consider" whether arbitration was required "but rather relied upon the merger clause and forum selection provisions." Opp. 3-4. Security makes the same argument as to the scope of the issues before the Sixth Circuit, contending (*id.* at 14) that the court of appeals "was not asked to resolve issues related to the arbitrability of the claim" and "was asked to overrule the District Court's Order holding that the 1994 Agreement was applicable to claims relating to product supplied under earlier contracts under a merger clause." *Id.* These assertions are wrong.

As the district court itself explained, the only relevance of the merger clause in this case is to show that Security's

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of a 'Dispute' and subject to the dispute resolution process in Section 13. As the United States Supreme Court has stressed, district courts must resolve 'any doubts' about arbitrability of a dispute . . . in favor of submitting the matter to arbitration."); *id.* at 100 ("Section 13 contemplates that the parties will submit all disputes to a three-step, non-judicial settlement process which culminates, to the extent there are disputes remaining after the first two non-binding settlement steps, in submission of the dispute to a neutral third party for binding resolution under the Commercial Arbitration Rules of the [American Arbitration Association].").

pre-1994 claims are subject to the 1994 Agreement's arbitration clause. See Pet. App. 19a ("Defendants, however, contend that the 1994 dealership contract arbitration provisions do compel arbitration even as to 1993 and earlier claims because the 1994 contract supersedes all prior dealership contracts [by virtue of the merger clause]."). It was only because of the merger clause that the court held that Security's pre-1994 claims were subject to the "arbitration provisions" of the 1994 Agreement. *Id.* at 22a.[2] Therefore, it is simply not true that the arbitrability issue "was not considered by the District Court." Opp. 5.

To bolster its erroneous assertions to the contrary, Security emphasizes the court's statement "that '. . . the issue of the amount involved . . . is to be addressed by the arbitrator *or New Jersey Courts*' " Opp. 3 (first omission and emphasis in original). This only serves to highlight the error of Security's position.

As AT&T demonstrated in the Petition (Pet. 5, 13 n.2), the district court *expressly stated* that the "size" of Security's claims is "itself arbitrable." Pet. App. 22a n.2 (citing *AT&T Corp.* v. *Vision One Sec. Sys.*, 914 F. Supp. 392, 398 (S.D. Cal. 1995)). In so holding, the court obviously accepted AT&T's argument in the joint motion to dismiss that "[w]hether there is in fact 'an amount in controversy [that] exceeds $1 m[illion]' is an issue that is subject to arbitration before resort to the courts may be had"—an argument AT&T supported with citation to the *same* case cited by the district court, *i.e.*, *AT&T* v. *Vision One Security Systems.* R. 101 n.12 (quoting 1994 Agmt. § 13) (alterations in original). Because the size of the claim itself is arbitrable, the district

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[2] In fact, the merger clause need not have been considered at all if, as Security wrongly claims, the district court merely rested on choice-of-forum grounds because, as the Sixth Circuit noted, "the pre-1993 contracts" (Pet. App. 11a n.5), "the 1993 Agreement" (*id.* at 11a), and "the 1994 Agreement" (*id.* at 11a n.5) all "included the same provision" concerning choice of forum. *Id.*

court correctly concluded that arbitration would be required even accepting as true, *arguendo*, Security's naked assertion that its claim is worth in excess of $1 million and therefore need not be arbitrated under the terms of the 1994 Agreement.[3]

Tellingly, Security does not respond to this point, preferring instead to pretend as if the court's statement as to the arbitrability of the size of the claim does not exist. The reason for Security's silence is obvious. The court's statement completely refutes Security's revisionist claim that the district court, after concluding that the merger clause of the 1994 Agreement subjected pre-1994 claims to the "arbitration provisions" of the 1994 Agreement (Pet. App. 22a), somehow failed to "consider[]" the arbitrability of Security's claims. Opp. 5. In truth, the court held that *all* of Security's claims should have been arbitrated because (1) the merger clause of the 1994 Agreement superseded pre-1994 agreements and therefore subjected pre-1994 claims to the arbitration clause of the 1994 Agreement (Pet. App. 21a-22a); and (2) the exception in the 1994 Agreement for claims in excess of $1 million could not justify Security's end-run around the arbitration process because the size of the claim is itself arbitrable (*id.* at 22a & n.2).[4]

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[3] This explains the court's admittedly ambiguous reference to the "New Jersey courts," Pet. App. 22a. Under the court's view, the case could potentially be refiled in the courts of New Jersey if the arbitrator were to find that the value of Security's claim in fact exceeds $1 million. Absent a prior determination by an arbitrator on that valuation issue, however, the court simply could not say whether the case would be resolved on the merits by the arbitrator or by the New Jersey courts and hedged its opinion accordingly.

[4] Although Security disputes it (Opp. 8), the fact is that the Sixth Circuit itself initially recognized that the district court's opinion rested "in part" on the arbitration clause—which is enough to establish that the opinion disposed of the case in favor of arbitration: "To be sure the district court based its dismissal of

To be sure, the district court also relied on choice-of-forum grounds as a supplemental ground for decision. Importantly, however, the court did so only as to nominal respondent Sentinel Systems, Inc. ("Sentinel"). See Pet. App. 22a (holding that "the choice of forum clause precludes suit *against Sentinel* in this district") (emphasis added). Thus, as the Sixth Circuit stated, choice of forum was only an "alternative basis for granting the motion to dismiss *with respect to Sentinel*." *Id.* at 11a (emphasis added).

The *sole* ground for dismissing the Complaint as to AT&T was "that the 1994 dealership contract, which supersedes all prior contracts between the parties, requires these disputes to be submitted to arbitration." Pet. App. 15a-16a. This explains why the court of appeals below could affirm the choice-of-forum dismissal as to Sentinel but nevertheless rule that "Security will be permitted to proceed against AT&T in the Western District of Tennessee on its pre-1994 claims." *Id.* at 2a. For the court of appeals below to have entertained an immediate appeal of the district court's determination (whether right, as AT&T believes, or wrong, as Security believes) that arbitration is required flies in the face of the avowed purpose of the 1988 amendments to the FAA, as shown in the Petition without contravention by Security (Pet. 11-15),

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Security's action, in part, on the preclusion of the Tennessee forum by the ADR Clause of the 1994 Agreement," which, the panel added, "requires the parties to enter into binding arbitration in New Jersey if the amount in controversy is less than $1 million." Pet. App. 4a. The panel, however, ignored the logical consequence of that recognition—namely, that the district court's order was in favor of arbitration—by stating that "the disrict court did not determine the amount in controversy." *Id.* As explained in the text, that is utterly beside the point given the district court's conclusion that the size of the claim is itself arbitrable. *Id.* at 22a. Like Security, the Sixth Circuit simply ignored this critical aspect of the district court's order, which establishes beyond peradventure that the district court regarded *all* of Security's claims as arbitrable.

to preclude immediate appeals from orders favoring arbitration.

Security complains that accepting AT&T's contention on this score would allow AT&T to "avoid appellate review" of the "wrongly-decided" motion to dismiss. Opp. 9. Again, Security is incorrect. Giving effect to the conceded legislative purpose of section 16 does not preclude review of an order favoring arbitration in an embedded proceeding; it merely "postpones" appellate review "until the arbitration proceeding has run its course." *McCarthy* v. *Providential Corp.*, 122 F.3d 1242, 1245 (9th Cir. 1997), *cert. denied*, 119 S. Ct. 275 (1998). Although Security's disapproval of Congress's policy choice in this regard is evident, this Court has already noted, in the context of the FAA's review scheme, that "courts must give full effect to this express congressional judgment" concerning the timing of appellate review in cases involving demands for arbitration. *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 880 n.7 (1994).

3. Security's next tack is to try and make it seem as if the Sixth Circuit did not decide the interlocutory appealability issue that all agree has divided the Circuits. Security asserts that "the Appellate Court based its jurisdiction of [sic] the Order on 28 U.S.C. § 1291" and that this case therefore "presents [no] opportunity for this Court to provide an authoritative answer on the proper interpretation of § 16(a)(3) of the FAA." Opp. 11 (quoting the FAA, 9 U.S.C. § 16(a)(3)). This fallacious argument can be dispatched in short order.

The Sixth Circuit's conclusion that it could entertain Security's appeal rested squarely on an interpretation of the FAA. The court opened its brief analysis of the jurisdictional issue by noting that "§ 16(a)(3) permits an appeal to be taken from a final decision with respect to arbitration." Pet. App. 4a. This was significant because in *Arnold* v. *Arnold Corp.*, 920 F.2d 1269, 1275-76

(6th Cir. 1990), the Sixth Circuit "held that an order dismissing an action in favor of arbitration is a final order appealable under § 16(a)(3)." Pet. App. 4a. Because "[t]he present action was dismissed by the district court," the panel deemed itself bound by *Arnold* to accept jurisdiction. *Id.*

As a result, the Sixth Circuit did not, as Security would have it, "refuse[] to be drawn into . . . . a muddle of jurisdictional controversy." Opp. 9. Rather, the court waded directly into that controversy, following its prior decision in *Arnold* notwithstanding *Arnold*'s rejection by at least *eight* other Circuits, see generally Pet. 6 n.1; Pet. App. 4a. Because the Sixth Circuit clearly *did* rely on the formalistic minority view adopted by *Arnold* and two other Circuits that section 16(a)(3) allows review of orders of dismissal in embedded proceedings, this case presents a suitable vehicle for resolving the deep and acknowledged split among the Circuits on the proper construction of that provision of the FAA.

The fact that the Sixth Circuit also cited 28 U.S.C. § 1291 (Pet. App. 5a) does not detract from this conclusion. To the contrary, it provides an additional reason for *granting* review here. This is so because the fact that the court of appeals looked to section 1291, the general authorization of appellate jurisdiction over final judgments of district courts, gives this Court an opportunity to resolve the relationship between section 1291 and FAA section 16(a)(3)—yet another issue of law decided incorrectly by the Sixth Circuit.

In the 1988 amendments, Congress specified the circumstances in which interlocutory appeals would be permissible (see 9 U.S.C. § 16(a)(1), (a)(2)) and would not be (see *id.* § 16(b)), coupled with a general authorization for appeals from "a final decision with respect to an arbitration," *id.* § 16(a)(3). Allowing jurisdiction under section 1291 for final decisions in the arbitration

context quite clearly renders section 16(a)(3) completely superfluous, contrary to "the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant" (*Kungys* v. *United States*, 485 U.S. 759, 778 (1988)) and the related rule of construction "that gives precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern." *Simpson* v. *United States*, 435 U.S. 6, 15 (1978). The only way to preserve independent meaning for section 16(a)(3) is to interpret that provision as the exclusive font of appellate jurisdiction over final decisions in the arbitration context. By granting review here, the Court not only can resolve the festering Circuit split on the proper reading of section 16(a)(3), but also clarify the proper relationship between that provision and section 1291.

4. In closing, AT&T offers a few observations on the merits. Security does not deny that the Sixth Circuit's interpretation of section 16(a)(3) produces the arbitrary result that the all-important question of whether an immediate appeal lies will depend on the label affixed by the district court to its order rather than the substance of the order. That is, if the court enters a stay pending arbitration or a dismissal coupled with an order specifically compelling arbitration, an immediate appeal is barred. Nevertheless, an immediate appeal can freely be taken, and arbitration delayed in derogation of the agreement of the parties, if the court simply invokes an arbitration clause as a ground for dismissal. This is an absurd result that Congress simply could not have intended, which explains why at least eight Circuits have rejected it in favor of the more sensible view that the FAA precludes appellate jurisdiction over decisions favoring arbitration, however styled, until arbitration has been completed. See Pet. 6 n.1, 11-15.

Likewise, Security cannot defend the Sixth Circuit's conclusion that the *federal* rule that all doubts must be re-

solved in favor of arbitration can be trumped by *state* law maxims of contract interpretation, see Pet. 17. Security also attempts no justification of the Sixth Circuit's evisceration of that rule by limiting it to arbitration clauses only, as opposed to *any* interpretive question that impacts "the scope of arbitrable issues." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24; see Pet. 15-16. Each of these rulings seriously erodes the strong federal policy favoring arbitration by transforming it into nothing more than a policy to be applied in the breach, when no state law maxims of interpretation can be marshalled against arbitration. In doing so, the Sixth Circuit's decision undermines both judicial economy and the ability of parties to commercial transactions to rely on arbitration clauses to channel disputes away from the costly, time-consuming litigation process into the more efficient and expeditious arbitration process. AT&T respectfully submits that a published decision from a Circuit that stands so starkly in conflict with decisions of other Circuits and of this Court—not to mention the avowed purpose and design of a federal statute—warrants review by this Court.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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